UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

UNITED STATES OF AMERICA, et al. Plaintiffs, v. DAIRY FARMERS OF AMERICA, INC., et al. Defendants.	)	Civil Action No.: 6:03-206-KSF

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DAIRY FARMERS OF AMERICA, INC.'S ESTOPPEL AND WAIVER AFFIRMATIVE DEFENSES

The United States brought this action to challenge a February 2002 acquisition by Dairy Farmers of America, Inc. ("DFA") of a controlling interest in the Southern Belle dairy in Somerset, Kentucky. *See* Compl. ¶ 1. At the time of this acquisition, DFA already owned a controlling interest in Southern Belle's primary (and often only) competitor in the sale of milk to school districts in southeastern Kentucky and northeastern Tennessee – the Flav-O-Rich dairy in London, Kentucky. The effect of DFA's acquisition of control over Southern Belle "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

DFA alleges as an "affirmative defense" that the government is estopped or has waived its right to enforce the antitrust laws in this case. *See* Answer of DFA ("Answer") at 10. The courts have made clear, however, that "estoppel will seldom apply against" the government. *Michigan v. City of Allen Park,* 954 F.2d 1201, 1217 (6th Cir. 1992) (citing *Heckler v. Community Health Services,* 467 U.S. 51, 60 (1984)). For estoppel to apply, there must be, at

the very least, a showing of "intentional affirmative misconduct" on the part of the government, and justifiable reliance on the part of the defendant. *See, e.g., City of Allen Park,* 954 F.2d at 1217; *Community Health Services*, 467 U.S. at 59-60; *United States v. River Coal Co.,* 748 F.2d 1103, 1108 (6th Cir. 1984).

As discussed herein, DFA's interrogatory responses establish that DFA does not contend that the government has engaged in any "intentional affirmative misconduct" toward DFA or made any misrepresentations upon which DFA could have relied when acquiring Southern Belle. Nor, as required by its waiver defense, does DFA allege any facts even potentially supporting its allegation that the government knowingly waived the right to challenge DFA's acquisition.

Because the facts alleged by DFA in its interrogatory responses do not come close to satisfying the elements of estoppel or waiver, even viewing all those facts and inferences in the light most favorable to DFA, the government is entitled to partial summary judgment on both defenses.[1] Indeed, as shown below, the defenses border on the frivolous and serve no purpose but to needlessly inject a large number of factual disputes related to older irrelevant transactions and markets into this litigation. Granting partial summary judgment here "will greatly narrow the scope of discovery, will streamline the issues to be decided at trial, and will thus serve the interests of judicial economy."[2] Accordingly, the United States is entitled to partial summary judgment as to DFA's estoppel and waiver defenses.

STATEMENT OF THE CASE

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[1] *See e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *United States v. Fire Ring Fuels, Inc.*, 788 F. Supp. 326, 329 (E.D. Ky. 1991).

[2] *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 682, 692 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3393 (Nov. 24, 2003) (No. 03-779).

Since December 2001, DFA has owned a 50% common interest and a 92% preferred equity interest in National Dairy Holdings, L.P. ("NDH"), which owns the assets of and operates the Flav-O-Rich dairy in London, Kentucky. *See* Compl. ¶¶ 7, 10. In February 2002, DFA acquired a controlling interest – 50% common interest and 100% preferred equity interest – in the Southern Belle dairy located in nearby Somerset, Kentucky, when it paid $18 million of the dairy's $19 million purchase price. *Id.* ¶¶ 11, 12. DFA made this acquisition despite being well aware that the government had successfully sued in 1999 to prevent common ownership of these *same two dairies* when the previous owner of Flav-O-Rich sought to acquire Southern Belle. The government alleges that DFA's partial ownership of Southern Belle and NDH (and its Flav-O-Rich dairy) give DFA the ability to influence or control significant business decisions of both companies. *See* Compl. ¶¶ 10-11.

Southern Belle and Flav-O-Rich are each other's primary competitors for milk sold to school districts throughout southeastern Kentucky and northeastern Tennessee. *See id*. ¶¶ 30-33. For ten years, from the late 1970s to late 1980s, Southern Belle and Flav-O-Rich successfully rigged their bids in selling milk to school districts in Kentucky. *Id.* ¶ 18. In carrying out their bid rigging conspiracy, both dairies raised their prices to schools, resulting in several million dollars of overcharges to the schools, without attracting competition from other dairies.

For each of the past four years, Southern Belle and Flav-O-Rich have been the *only* bidders in 47 school districts. *Id.* ¶ 32 and Attachment A thereto. In 54 school districts, they were two of only three bidders. *Id.* ¶ 33 and Attachment B thereto. In 1998, Southern Belle acknowledged, in proceedings before the USDA, that it and Flav-O-Rich are the only

competitors for many rural school districts and that those districts are not likely to attract competition from other dairies.[3]

Despite these allegations (and Southern Belle's and Flav-O-Rich's long history of collusion in school milk markets), DFA seeks to prevent the Court from considering whether its ownership of more than 90% of the combined debt and equity of these two competing dairies violates the federal antitrust laws, claiming in its third affirmative defense that:

> Plaintiff United States is estopped from asserting, or has waived the right to assert, that DFA's acquisition of a partial ownership in [Southern Belle] violates Section 7 of the Clayton Act based on its prior actions involving predecessor cooperatives to DFA.

DFA Answer at 10. This affirmative defense does not apply to the co-plaintiff, the Commonwealth of Kentucky.

In an interrogatory, the government asked DFA to provide "each specific representation or misrepresentation, instances of affirmative misconduct, or any other action or inaction taken by any representatives of the United States" that DFA contends support its affirmative defenses. *See* ("SOF") ¶ 4, Exhibit 1. In response, DFA explicitly claimed only that:

- a number of Department of Justice attorneys told DFA's counsel at various times that "the Department lacks any evidence whatsoever that DFA's simultaneous investment in competing fluid milk processors lessened competition in any relevant market;" and
- the government "permitted [the sale of milk distribution routes] from one entity affiliated with Mid-American Dairymen, Inc. (LOS) to another

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[3] *See id*. ¶ 35 & Attachment C thereto. Attachment C is Southern Belle's submission at a USDA hearing to determine whether Southern Belle should be prevented from bidding for certain school milk business as a penalty for breaching an antitrust compliance agreement between the USDA and Southern Belle. In the submission, Southern Belle argued that it should not be debarred because debarment would leave Flav-O-Rich as the only bidder for many rural school districts in which Southern Belle and Flav-O-Rich are the only competitors.

> (Valley Rich, LLC)" to "resolve the competitive concerns raised by the Department regarding competition between the LOS and FOR fluid milk processing plants."[4]

DFA did not allege any affirmative misconduct by the government. Nowhere does DFA allege that the government made *any* statements suggesting in any way that DFA's acquisition of Southern Belle was legal or that the government would refrain from enforcing the antitrust laws in this case. And although reliance is a necessary element of DFA's estoppel defense, DFA said that it could not identify "every statement, omission or act by the Department" that it claims support its defense. *Id.* Ironically, in light of that statement, DFA did not specifically identify how it came to rely on *any* identified statement, omission or act.

DFA apparently seeks to use the defenses to revisit past settlements in other markets in other parts of the country, transforming this case from a single merger challenge involving discrete markets in Kentucky and Tennessee to a review of multiple merger transactions over the past decade, involving dozens of dairies in a variety of geographic areas, facing different competitive situations. And, even if DFA successfully estopped the United States from prosecuting the antitrust violation by doing all that, the Commonwealth of Kentucky would still be able to pursue the action and the Court would still eventually have to decide the actual merits of this transaction. Accordingly, resolution of this motion in favor of the government will avoid

[4] *See* SOF ¶ 5. DFA explicitly identified in its interrogatory responses the current Assistant Attorney General of the Antitrust Division, three former Deputy Assistant Attorneys General, and six attorneys of the Antitrust Division who allegedly either made such a statement or took actions consistent with such a statement. DFA also referred generally to a large number of documents that relate to the resolution of other merger investigations. A summary of some of those merger investigations and their resolutions, though irrelevant for purposes of this motion, is provided in Appendix A hereto.

irrelevant, distracting and potentially harassing discovery by eliminating issues that are immaterial to the resolution of the merits of this lawsuit.

ARGUMENT

Because DFA's interrogatory response establishes that DFA's estoppel and waiver defenses are factually insupportable, partial summary judgment should be granted to the government with respect to each defense. *See, e.g., Fire Ring Fuels*, 788 F. Supp. at 329; *United States v. Wood,* 658 F. Supp. 1561, 1572 (W.D. Ky. 1987), *aff'd,* 877 F.2d 453 (6th Cir. 1989). Estoppel and waiver are affirmative defenses, and an affirmative defense, "like any other issue, may be summarily adjudicated if it does not involve a genuine issue of material fact." *Fire Ring Fuels,* 788 F. Supp. at 329 (citations omitted).

I. The Factual Allegations In DFA's Interrogatory Responses Do Not Support Its Estoppel Defense As A Matter Of Law.

"[I]t is well settled that the government may not be estopped on the same terms as any other litigant." *Community Health Services,* 467 U.S. at 60. "Estoppel will seldom apply" against the government. *City of Allen Park*, 954 F.2d at 1217; *see also Fire Ring Fuels*, 788 F. Supp. at 329. Indeed, the Supreme Court has "reversed every finding of estoppel that [it] ha[s] reviewed," *OPM v. Richmond,* 496 U.S. 414, 421 (1990), noting that the reasons supporting a *per se* rule against government estoppel are "substantial." *Id*. at 423. These reasons include separation of powers considerations, *id.* , and because, "[w]hen the United States is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Community Health Services,* 467 U.S. at 60.

Accordingly, in emphasizing the high hurdles for estoppel claims against the government, the Sixth Circuit has made it clear that for an estoppel claim to succeed, "[a]t the very minimum some affirmative misconduct of a government agent is required." *River Coal*, 748 F.2d at 1108. Likewise, federal district courts in Kentucky have consistently granted summary judgment to the government on estoppel defenses absent affirmative misconduct. *See, e.g., Fire Ring Fuels*, 788 F. Supp. at 329; *Wood,* 658 F. Supp. at 1572.

Moreover, in addition to affirmative misconduct, an estoppel defense "cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Community Health Services,* 467 U.S. at 59. Thus, DFA must establish, among other things, that it "relied on [the government's] conduct 'in such a manner as to change [DFA's] position for the worse,'" *id.* (citation omitted), and that this reliance caused it to "suffer substantial prejudice." *TRW, Inc. v. FTC,* 647 F.2d 942, 951 (9th Cir. 1981); *see also, e.g., Anderson v. AT&T Co.,* 147 F.3d 467, 477 (6th Cir. 1998).

DFA does not allege the essential elements of a legitimate estoppel defense. Thus, DFA's attempt to preclude antitrust scrutiny of its acquisition of a controlling interest in Southern Belle should be rejected.

A. DFA Does Not Contend That The United States Has Engaged In Any Affirmative Misconduct.

It is well settled that affirmative misconduct for purpose of "[e]stoppel generally requires that government agents engage – by commission or omission – in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result." *GAO v. GAO Personnel Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983). DFA must show "intentional affirmative misconduct," *City of Allen Park,* 954

F.2d at 1217, "an affirmative act to misrepresent or mislead," *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000), or "a deliberate lie or a pattern of false promises," *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001). Affirmative misconduct is "more than mere negligence, delay, inaction or failure to follow an internal agency guideline." *Fisher v. Peters*, 249 F.3d 433, 444-45 (6th Cir. 2001) (internal quotation marks omitted).[5]

DFA does not contend that the government has engaged in the kind of intentional affirmative misconduct necessary to support DFA's estoppel defense. Rather, DFA points to: (1) generalized statements allegedly made by the government to DFA's attorneys about the quantum of evidence it possessed at the time; and (2) the resolution of a previous merger investigation involving other markets and a predecessor of DFA, neither of which limit the government's future enforcement discretion in any way.

1. Any Statements by Government Attorneys Regarding an Alleged Lack of Evidence Do Not Constitute Affirmative Misconduct

DFA alleges that the government has suggested that it does not have proof that DFA's partial ownership of other dairies has actually lessened competition in a relevant market. *See* SOF ¶ 5. However, even if DFA's allegations were true, they do not amount to allegations of "intentional misconduct," "an affirmative act to misrepresent or mislead," or "a deliberate lie or a pattern of false promises." DFA does not contend that in past investigations the government

[5] Other circuits have similar standards. *See, e.g.*, *U.S. v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) ("affirmative misconduct requires more than governmental negligence or inaction"); *Dantran, Inc. v. U.S. Dept. of Labor*, 171 F.3d 58, 67 (1st Cir. 1999) ("affirmative misconduct requires something more than simple negligence"); *Bd. of County Comm'rs v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994) ("Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact.").

made statements about how the government would enforce the antitrust laws in cases involving DFA's partial ownership of competing dairies or that it attempted to mislead DFA in any way. But even if that had occurred, such statements by government counsel in a past case could not bind the government in future unrelated cases. *See, e.g., Heckler v. Chaney,* 470 U.S. 821, 836 n.5 (1986) ("[W]e find it difficult to believe that statements of agency counsel in litigation against private individuals can be taken to establish 'rules' that bind an entire agency prospectively.").

Furthermore, DFA cannot rely on such alleged statements to estop the government because evidence of actual harm to competition (such as increasing prices) is not necessary to establish a Clayton Act violation. Contrary to DFA's implicit suggestion that the government should be estopped from enforcing the antitrust laws absent such evidence, Section 7 of the Clayton Act "itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition,'" not that anticompetitive effects have actually occurred. *California v. American Stores, Inc.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18). This is because Section 7 "was intended to arrest anticompetitive tendencies in their 'incipiency'" – before the adverse effects take place. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 361 (1963) (citation omitted).

DFA also ignores settled law that an increase in concentration of ownership of competitors in an already concentrated market, like the school milk markets at issue here, *alone* establishes a *presumption of illegality* under the Clayton Act. *Id.* at 362, 364-65 (merger resulting in combined 30% market share illegal). The Supreme Court adopted this "simplif[ied]

. . . test of illegality" precisely because "the relevant data are both complex and elusive" in antitrust cases. *Id.* at 362. The Court reasoned that the "intense congressional concern with the trend toward concentration [reflected in Section 7 of the Clayton Act] warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects." *Id.* This presumption applies to partial acquisitions such as this one, even absent the level of ownership that DFA holds in Southern Belle and NDH. *See, e.g., F&M Schaeffer Corp. v. C. Schmidt & Sons, Inc.,* 597 F.2d 814, 816 (2d Cir. 1979) (finding a violation with 29% partial ownership stake).

Accordingly, DFA fails to point to any statements allegedly made by representatives of the government that amount to affirmative misconduct. As a result, DFA's estoppel defense fails as a matter of law.

2. The Government's Resolution of an Investigation Pursuant To Its Prosecutorial Discretion Does Not Constitute Affirmative Misconduct

DFA's allegation that the prior resolution of an investigation between the government and a DFA predecessor supports its estoppel defense is also meritless. The government's prior resolution did not limit the government's future prosecutorial discretion to enforce the antitrust laws against DFA or any other person. DFA apparently believes (but does not explicitly state) that in suing to compel DFA to divest its interests in Southern Belle, the government is impermissibly seeking more aggressive relief than in the past. Even if DFA could establish that this acquisition, and the markets at issue here, are *identical* to those involved in other settlements (which DFA does not allege), DFA's defense would still fail as a matter of law. The decision regarding whether to bring a given enforcement action and what kind of relief to seek "generally

rests entirely in [the government's] discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978). The government cannot be estopped from pursuing this case based on an allegation that it may have settled other cases on different terms, or decided not to challenge other conduct. *See, e.g., Fisher v. Peters*, 249 F.3d 433, 444-45 (6th Cir. 2001); *State Bank of Fraser v. United States*, 861 F.2d 954, 961 (6th Cir. 1998) (IRS not estopped from seeking relief that in the past it had not pursued).

The Sixth Circuit has expressly held in the antitrust enforcement context that the government's "fail[ure] to prosecute civil antitrust actions to divest other industry acquisitions" is not a defense to an action for divestiture, because "the government 'alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.'" *United States v. Leggett & Platt, Inc.,* 542 F.2d 655, 658 (6th Cir. 1976) (quoting *Moog Indus., Inc. v. FTC,* 355 U.S. 411, 413 (1958)). Courts widely recognize that the government has broad discretion in antitrust cases to determine what relief to seek. *See, e.g., United States v. Microsoft Corp.,* 56 F.3d 1448, 1459-60 (D.C. Cir. 1995); *Parker v. Kennedy*, 212 F. Supp. 594, 595 (S.D.N.Y. 1963). Such discretion is essential given the fact-specific nature of antitrust analysis.[6] Accordingly, DFA's allegations regarding past settlements between DFA and the government do not establish affirmative misconduct and do not support its estoppel defense.

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[6] The guidelines followed by the government in reviewing mergers reflect the fact-specific nature of antitrust enforcement. *See* 1992 Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* (1997 rev.). The analytical framework set out in the *Guidelines* has been widely adopted by the courts. *See, e.g., FTC v. H.J. Heinz Co.,* 246 F.3d 708, 716 (D.C. Cir. 2001); *Olin Corp. v. FTC,* 986 F.2d 1295, 1300 (9th Cir. 1993).

B. DFA's Estoppel Defense Fails Because DFA Does Not Allege That It Relied On Any Misrepresentations By The Government.

DFA's estoppel defense also fails because DFA does not contend that it changed its position in any way or suffered any substantial prejudice as the result of any intentional representations made by the government. *See* SOF ¶ 5. These are essential elements of an estoppel defense. *See, e.g., Community Health Services,* 467 U.S. at 59; *Anderson*, 147 F.3d at 477; *TRW,* 647 F.2d at 951. Nevertheless, DFA does not identify a single representation where the government told DFA that the government would not challenge DFA's acquisition of a controlling interest in competing dairies. Nor does DFA point to any settlement containing language that precludes the government from enforcing the antitrust laws against DFA in future cases.

Moreover, the only government statements DFA points to that involve *this* acquisition occurred *after* the acquisition took place. *See* SOF ¶ 5. DFA could not have "change[d] [its] position for the worse," *Community Health Services,* 467 U.S. at 59, or suffered "substantial prejudice," *TRW,* 647 F.2d at 951, based on statements made *after* it undertook the acquisition subject to this lawsuit. Accordingly, given the absence of any allegation by DFA that it relied on statements by the government, partial summary judgment should be granted to the government on DFA's estoppel defense.

II. DFA's Waiver Defense Fails Because DFA Does Not Allege That The Government Knowingly Relinquished Its Right to Bring This Action.

DFA alleges that the government has "waived the right to assert" that DFA's acquisition of Southern Belle violates the Clayton Act. *See* Answer at 10. However, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *See In*

re Air Crash Disaster, 86 F.3d 498, 517 (6th Cir. 1996); *see also, e.g., United States v. Olano,* 507 U.S. 725, 731 (1993). DFA does not allege any facts showing that the government, contrary to its public mandate, knowingly waived its right (and obligation) to enforce the antitrust laws in this case. As established above, DFA does not contend that any of the past settlements of other investigations it references limited the government's right to challenge DFA's acquisition of a controlling interest in competing dairies, especially in markets as concentrated and susceptible to anticompetitive conduct as the markets at issue here. *See* SOF ¶ 5. Moreover, the only settlement that addressed competition between Southern Belle or Flav-O-Rich is one that DFA here ignores – the *Suiza/Broughton* settlement – where the government sued to prevent common ownership of the same two dairies at issue here. *See, e.g.*, SOF ¶ 13 (Exhibits 5 & 6) and Appendix A.

Nor does DFA contend that the government, in any of its representations, purported to limit its right to challenge future acquisitions by DFA. Indeed, it is doubtful whether the Department of Justice could generally waive its obligation to enforce the antitrust laws on behalf of the government irrespective of the merits of particular cases.[7] The only representations alleged by DFA involving this transaction allegedly occurred in meetings with the government *after* DFA acquired Southern Belle. DFA does not contend that the government somehow suggested in any of those meetings that it would waive the right to challenge DFA's Southern

[7] *See, e.g., Heckler v. Chaney,* 470 U.S. at 1656 n.4. (suggesting that the presumption against judicial review of agency prosecutorial discretion not to enforce the law may not apply where an agency "'consciously and expressly adopt[s] a general policy' so extreme as to amount to an abdication of its statutory responsibilities") (quoting *Adams v. Richardson,* 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

Belle acquisition for any reason. Accordingly, partial summary judgment should be granted to the government as to DFA's waiver defense.

CONCLUSION

For the foregoing reasons, the government should be granted partial summary judgment as to DFA's estoppel and waiver affirmative defenses.

Respectfully submitted,

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APPENDIX A

1) 1995: Land O' Sun Dairies. Inc.'s Acquisition of Flav-O-Rich

In 1995, Land O' Sun Dairies, Inc. ("Land O' Sun") proposed merging with Flav-O-Rich, Inc., a company owned by Mid-America Dairymen, Inc. ("Mid-Am"), a predecessor of DFA. Land O' Sun owned three dairies at the time, including a dairy in Kingsport, Tennessee. Flav-O-Rich owned five dairies at the time, including a dairy in Bristol, Virginia, 25 miles away from Kingsport. The merged company was to be 50% owned by Land O' Sun and 50% owned by Mid-Am.

The government expressed concerns about reduced competition between Land O' Sun's Kingsport, Tennessee and Flav-O-Rich's Bristol, Virginia dairies as a result of the merger, which would affect school milk sold to districts in North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. The government allowed the transaction to proceed without legal challenge after the parties to the transaction divested distribution routes from the Bristol, Virginia dairy affecting 19 different school districts. These divested distribution routes were sold to Valley Rich Dairy in Roanoke, Virginia, which was 50% owned by Mid-Am. The parties also entered into a milk supply agreement with Valley Rich. The government issued a press release stating its belief at the time that the divestiture and supply contract would allow Valley Rich to compete effectively against the newly-merged Land O' Sun and Flav-O-Rich for school milk contracts in the districts most affected by the merger. *See* Statement of Undisputed Facts ¶ 11, Exhibit 3.

2) 1997: Mid-Am's Acquisition of Borden/Meadow Gold

In 1997, Mid-Am proposed acquiring Borden/Meadow Gold Dairies Holdings Inc. ("Borden"), which operated 27 dairies in 11 states. On September 3,1997, the government filed a complaint seeking to enjoin the transaction, alleging that it would reduce competition for school milk contracts between Borden dairies that Mid-Am would acquire and dairies already partially owned by Mid-Am. On February 27,1998, a consent decree was entered allowing the transaction to proceed after certain divestitures and other actions were taken by the parties.

hi Texas, Louisiana, and New Mexico, nine Borden dairies were required to be divested to a new company called Milk Products LLC, in which Mid-Am would have no ownership interest. Mid-Am financed Milk Products' purchase of the nine dairies, but was required by the government to eliminate its financing role within three years to minimize its interest in the former Borden dairies. *See* Statement of Undisputed Facts ¶ 12, Exhibit 4.

Also, Mid-Am altered its governance agreements in some of the dairies it partially owned in Colorado, Nebraska, and Oklahoma. These alterations were designed to reduce Mid-Am's role in the operation of these partially-owned dairies. The government accepted these varying forms of relief tailored to the varying competitive conditions of each geographic market.

3) 1999: Suiza Food Corporation's Acquisition of Broughton Foods Company

In 1999, Suiza Food Corporation ("Suiza") proposed acquiring Broughton Foods Company ("Broughton"). Suiza owned dozens of dairies, including the Flav-O-Rich dairy in London, Kentucky, and Broughton owned three dairies, including the Southern Belle dairy in Somerset, Kentucky.

After investigating the transaction, the government filed suit in the Eastern District of Kentucky, *United States v. Suiza Foods Corp., et al,* CV. No. 99-CV-130 (ED. KY 3/18/99), seeking to enjoin the transaction and alleging that competition for the sale of school milk would be harmed by the common ownership of the Southern Belle and Flav-O-Rich dairies. *See* Statement of Undisputed Facts ¶ 13, Exhibit 5. On September 1,1999, this Court entered a consent decree that required Suiza to divest Southern Belle to a third party group of investors before the transaction could proceed. *See* Statement of Undisputed Facts ¶ 13, Exhibit 6. These investors retained control of Southern Belle until it was sold to DFA and the Allen Family Limited Partnership ("AFLP") in February, 2002.

4) 2001: Suiza's Acquisition of Dean Foods Company

In 2001, Suiza proposed acquiring Dean Foods Company ("Dean"). Both companies had dairies which sold milk in Kentucky and Tennessee. The government expressed concern about competition for school milk sold in Kentucky and Tennessee, among other areas, but said it would not try to stop the transaction if the parties divested certain assets, including the Flav-O-Rich dairy in London, Kentucky. Suiza and Dean therefore sold eleven of their dairies, including the Flav-O-Rich dairy, to National Dairy Holdings, LP ("NDH"). DFA owns 50% of NDH's common shares and approximately 92% of its preferred shares.

5) 2002: NDH's Planned Acquisition of Southern Belle and DFA and AFLP's Acquistion of Southern Belle

On December 25,2001, one week after NDH agreed to acquire eleven dairies from Suiza and Dean, NDH verbally agreed to purchase the Southern Belle dairy from the investors who had purchased the dairy from Broughton. DFA agreed to contribute to NDH the purchase price of $19 million. After NDH was informed by counsel that the acquisition of Southern Belle would probably be challenged by the government, DFA agreed to acquire Southern Belle. DFA contacted one of its partners in other joint ventures, AFLP, proposing a joint venture between DFA and AFLP to acquire Southern Belle. The joint acquisition was consummated without any public announcements, contrary to normal DFA practice, and notwithstanding DFA's knowledge of the prior antitrust enforcement actions brought by the government involving the Southern Belle and Flav-O-Rich dairies. *See* Statement of Undisputed Facts ¶ 14, Exhibit 7.

CERTIFICATE OF SERVICE

This certifies that Icaused a true and correct copy of Plaintiff United States' Motion for Partial Summary Judgment as to Defendant Dairy Farmers of America's Estoppel and Waiver Affirmative Defenses, memorandum in support, and Statement of Undisputed Facts to be served on January 9 2004, in the manner indicated:

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